

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

CECILIO CARDENAS,

Petitioner,

v.

DARREN SWENSON,

Respondent.

NO. CV-06-3020-FVS

ORDER DISMISSING ACTION AS
TIME-BARRED

BEFORE THE COURT are Petitioner's Amended Habeas Corpus Petition (Ct. Rec. 12), a Response to Order to Proceed In Forma Pauperis and Order to Amend Petition (Ct. Rec. 13), a Motion for Permission to Amend Habeas Corpus Petition (Ct. Rec. 14), and a "Brief of Facts" (Ct. Rec. 8). Petitioner is a Washington State prisoner presently confined at the Prairie Correctional Facility in Appleton, Minnesota. He is proceeding *pro se* and *in forma pauperis*; Respondent has not been served.

Petitioner challenges a community custody term of 120 months stemming from his 1992 Yakima County jury conviction for second degree

1 murder¹. He contends he was given an exceptional sentence of
2 community custody which exceeds his statutory maximum sentence in
3 violation of the Fifth and Fourteenth Amendments.

4 After review of Petitioner's documents, the court finds this
5 habeas action is time-barred under the Antiterrorism and Effective
6 Death Penalty Act of 1996 (AEDPA), 28 U.S.C. § 2244(d). Petitioner
7 indicates he had filed a direct appeal which was pending between 1992
8 and 1994. See Ct. Rec. 13, page 3. Therefore, his conviction and
9 sentence became final prior to enactment of the AEDPA on April 24,
10 1996.

11 Petitioner, however, argues his sentence is invalid and void
12 pursuant to Washington state law, and therefore, it is not "final" and
13 statutory time bars do not apply to his case. There is no
14 authoritative ruling stating Petitioner's sentence is actually void.
15 Consequently, Petitioner's argument alone will not delay the onset of
16 the limitations period.

17 Petitioners whose convictions and sentences became final prior to
18 the enactment of AEDPA, had until April 24, 1997, one year from the
19 effective date of the AEDPA, to file a petition. See *Patterson v.*
20 *Stewart*, 251 F.3d 1243, 1245-46 (9th Cir. 2001). Petitioner, however,
21 asserts the onset of the limitations period should be delayed based on
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23 Petitioner states on his petition forms that he was convicted of
24 Second Degree Murder. From documents attached to Petitioner's "Brief
25 of Facts" (Ct. Rec. 8), including the Washington State Supreme Court's
26 Ruling Denying Review (Ct. Rec. 8, pg. 20), it appears Petitioner was
27 convicted of Attempted First Degree Murder.

1 *Blakely v. Washington*, 542 U.S. 296 (2004) and a decision from the
2 Washington State Court of Appeals, Division III, referencing RCW
3 9.94A.505(5).

4 Under 28 U.S.C. § 2244(d)(1)(C) the statute of limitations may
5 run from "the date on which the constitutional right asserted was
6 initially recognized by the Supreme Court, if the right has been newly
7 recognized by the Supreme Court and made retroactively applicable to
8 cases on collateral review." *Id. Blakely*, however, is not
9 retroactively applicable to cases on collateral review. See *United*
10 *States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005)
11 (there is no indication that the U.S. Supreme Court intended *Blakely*
12 to apply retroactively); *Schardt v. Payne*, 414 F.3d 1025, 1036 (9th
13 Cir. 2005) (concluding that *Blakely* does not apply retroactively to
14 cases on § 2254 habeas review).

15 The statute of limitations pertinent to a *Blakely* claim does not
16 begin to run on the date when *Blakely* was decided, pursuant to 28
17 U.S.C. § 2244(d)(1)(C), because *Blakely* has not been made
18 retroactively applicable on collateral review. Because *Blakely* is not
19 retroactively applicable on collateral review, the one-year statute of
20 limitations period did not begin to run, pursuant to § 2244(d)(1)(C),
21 when that case was decided. Consequently, the *Blakely* decision will
22 not delay the running of the limitations period.

23 Likewise, although Petitioner's claim of an exceptional sentence
24 may implicate Washington State court decisions, 28 U.S.C. §
25 2244(d)(1)(C) does not serve to delay the date the statute of
26 limitations began to run. The exceptional sentence claim does not
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1 involve a right of constitutional magnitude that has been newly
2 recognized by the United States Supreme Court and made retroactively
3 applicable to cases on collateral review. *See id.*

4 To the extent Petitioner argues the alleged change in state law
5 formed the factual predicate of his claim under 28 U.S.C. §
6 2244(d)(1)(D), his argument must also fail. Petitioner was aware at
7 the time of his sentencing in 1992 that he was sentenced to 120 months
8 of community custody. This was the factual predicate of his claim,
9 not his subsequent discovery of a legal argument that might further
10 his petition for relief. Petitioner has failed to demonstrate a basis
11 to delay the onset of the limitations period which began to run in
12 April 1996.

13 Petitioner's assertion the limitations period was tolled by his
14 Personal Restraint Petition is also without merit. The AEDPA provides
15 a prisoner is entitled to tolling for the pendency of a "properly
16 filed application for State post-conviction or other collateral review
17 with respect to the pertinent judgment or claim." 28 U.S.C. §
18 2244(d)(2); *see also Artuz v. Bennett*, 531 U.S. 4, 5(2000).
19 Petitioner indicates he submitted a Personal Restraint Petition to the
20 Washington State Court of Appeals, Division III, on June 1, 2005,
21 which was pending until a Certificate of Finality was issued December
22 15, 2005. Nevertheless, while Section 2244(d)(2) may stop the
23 limitations period, it cannot revive a time period that has already
24 expired. The limitations period in this case expired on April 24,
25 1997. *See Patterson v. Stewart*, 251 F.3d at 1245-46.

26 Although granted the opportunity to do so, Petitioner failed to
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1 present any grounds to equitably toll the limitations period.
2 Therefore, absent statutory or equitable tolling, Mr. Cardenas's
3 federal habeas petition signed February 26, 2006, is untimely. See 28
4 U.S.C. § 2254(d); *Patterson v. Stewart*, 251 F.3d at 1245-46.
5 Accordingly,

6 **IT IS HEREBY ORDERED:**

- 7 1. This action is **DISMISSED with prejudice** as time-barred.
8 2. All pending motions are denied as moot.

9 **IT IS SO ORDERED.** The District Court Executive is directed to
10 enter this Order, enter judgment, and forward a copy to Petitioner.

11 **DATED** this 30th day of June 2006.

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13 s/ Fred Van Sickle
14 FRED VAN SICKLE
15 UNITED STATES DISTRICT JUDGE
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